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NH CHAN, SITI NORMA YAAKOB AND ABDUL MALEK AHMAD JJCA
25 FEBRUARY 1997

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It is clear that s 7(i) of the Enactment prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to any person not being a Malay. In this case, the trial judge had found that the appellant was all along the registered proprietor of the properties; in short, no transfer was being effected. Moreover, it was never the intention of the parties to involve any transfer of

proprietorship. Accordingly, the execution of the property purchase agreement had not transgressed the provisions of ss 7 and 12 of the Enactment since there was no dealing or attempt to deal in the lands contrary to the provisions thereof. There was therefore no reason to disagree with the findings of the trial judge (see pp 397B–C, 401C–D, H, 402B).

[Bahasa Malaysia summary]

Plaintif ('perayu'), melalui wakilnya, telah mengikat satu perjanjian jualan harta dan perjanjian belian harta ('perjanjian-perjanjian tersebut') dengan defendan ('penentang') — bank dilesenkan di bawah Akta Bank Islam 1983 untuk menjalankan urusan bank secara Islam — berkaitan dengan 25 lot tanah ('harta-harta tersebut'). Mengikut Konsep Bank Islam iaitu Al Bai Bithaman Ajil, penentang membeli harta-harta tersebut dan kemudiannya menjual semula kepada perayu dengan keuntungan. Gadaian-gadaian ('gadaian-gadaian tersebut') juga dilaksanakan atas harta-harta tersebut berpihak kepada penentang sebagai jaminan kepada pinjaman yang diberikan.

Perayu memohon satu perintah bahawa gadaian-gadaian tersebut diisytiharkan batal dan tak sah. Beliau juga memohon pengembalian hakmilik harta-harta tersebut, bebas daripada bebanan, kepadanya. Peguam kepada perayu mengatakan bahawa pelaksanaan perjanjian-perjanjian tersebut tidak mematuhi peruntukan-peruntukan ss 7(i) dan (12) Enakmen Rizab Melayu 1930 Kelantan ('Enakmen tersebut') dan dengan itu urusan itu adalah batal dan tak sah dan pelaksanaan gadaian patut diketepikan. Selanjutnya diujahkan bahawa perkataan 'pindahmilik' dalam s 7(i) Enakmen tersebut boleh diertikan secara lebih luas dan tidak memerlukan pindahmilik secara fizikal. Hakim perbicaraan menolak permohonan tersebut. Perayu membuat rayuan.

Diputuskan, menolak rayuan dengan kos:

Adalah jelas bahawa s 7(i) Enakmen tersebut menghalang apa-apa pindahmilik atau letakhak apa-apa hak atau kepentingan orang Melayu dalam tanah rizab kepada mana-mana orang bukan Melayu. Dalam kes ini, hakim perbicaraan telah mendapati bahawa perayu adalah pemunya berdaftar harta-harta tersebut; ringkasnya, tiada pindahmilik telah dilaksanakan. Tambahan pula, tidak pernah menjadi niat pihak-pihak untuk melibatkan pindahmilik pemunyaan. Oleh yang demikian, pelaksanaan perjanjian belian harta itu tidak melanggar peruntukan-peruntukan ss 7 dan 12 Enakmen tersebut kerana tiada urusan atau cubaan untuk menguruskan tanah-tanah itu bertentangan dengan peruntukan-peruntukan tersebut. Oleh itu, tiada sebab untuk tidak bersetuju dengan pendapat hakim perbicaraan (lihat ms 397B–C, 401C–D, H, 402B).

Notes

For cases on banks and banking business, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1063–1138.

- A For a case on dealings in reservation land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2036.

Cases referred to

- B *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 (refd)
 Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud [1976] 2 MLJ 79 (refd)
 Ho Giok Chay v Nik Aishah [1961] MLJ 49 (refd)
 Hussanjan v Haji Nik Yahya bin Nik Daud & Ors [1973] 1 MLJ 9 (refd)
- C *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379 (refd)
 Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazuraiyah bte Mohamed [1988] 1 MLJ 27 (refd)

D Legislation referred to

- Islamic Banking Act 1983
 Land Enactment 1938 (Kelantan) s 136, Sch 26A
 Malay Reservations Enactment 1930 (Kelantan) ss 3(i), 7(i), 9A, 12, 13A, Sch D
- E National Land Code 1965 s 340

Appeal from: High Court (Kota Bharu) Originating Motion No 25–26 of 1994

Joseph Yeo (Aji Ariffin, Yeo & Harpal) for the appellant.

- F *Mohamed Ismail Shariff (K Thavakumar with him) (Mohamed Ismail & Co)* for the respondent.

Abdul Malek Ahmad JCA (delivering judgment of the court): The appellant, who was the plaintiff in the court below, had applied by originating motion dated 5 October 1994 for an order that the charges dated 8 May 1984 executed by his attorney in favour of the defendant, who is the respondent before us, in respect of 25 lots of land registered as PT 109 HS (D) KB 645/83, PT 110 HS (D) KB 646/83, and from PT 113 HS (D) KB 649/83 to PT 135 HS (D) KB 671/83, all in Section 12, Kota Bharu, Kelantan ("the properties") be declared null and void and of no effect and that the memorandum of charge registered under Charge No

G Jilid 39, Folio 36, Bil Perserahan No 109/83 and Charge No Jilid 39, Folio 37, Bil Perserahan No 1092/84 with the Director of Lands and Mines, Kota Bharu, Kelantan be cancelled.

He had also applied for an order that the property sale agreement and the property purchase agreement executed by the parties dated 6 May

I 1984 be declared null and void and of no effect and that consequent to both these prayers, the respondent be ordered to return the titles of the properties, free of all encumbrances, to him.

Under the property purchase agreement, the respondent had purchased the properties for RM520,000 but after having so purchased, under the

property sale agreement they were resold to the appellant for RM629,200 resulting in a profit of RM109,200. These two agreements were entered into on 6 May 1984. Two days later, the appellant's attorney executed the charges on the properties in favour of the respondent as security for the loan of RM629,200 purportedly granted under the Islamic Banking Concept of Al Bai Bithaman Ajil ('ABBA').

In support of the motion, the appellant raised two issues. The first was that the respondent was at all material times prohibited from accepting charges in respect of usury transactions. In consequence, the acceptance of the charges by the respondent in this instance was ultra vires its articles of association. However, this issue was abandoned at the outset of the hearing.

The second issue was that the execution of the property purchase agreement, property sale agreement and the charge documents amounted to a colourable exercise to defeat the very purpose and intention of the Malay Reservations Enactment 1930 of Kelantan ('the Enactment') and the National Land Code 1965 ('the Code').

On this issue, learned counsel for the appellant argued that the execution of the property purchase agreement had contravened the provisions of ss 7(i) and 12 of the Enactment and accordingly the court ought to declare that the dealing is null and void and that the creation of the charges by the appellant would be of no effect and should be set aside.

Section 7(i) of the Enactment provides:

No right or interest of any Malay in reservation land and no right or interest in such land acquired by virtue of section 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in subsections (ii) to (v) below, save as provided in this Enactment.

Reference is made in that provision to s 13A of the Enactment and it is therefore necessary to set it out here.

(i) His Highness the Ruler in Council may approve —

- (a) the alienation of any State Land included in a Malay Reservation,
- (b) the transfer or transmission of the right or interest of any Malay in reservation land, and
- (c) the transfer or transmission of any reservation land acquired by virtue of this section, by any person not being a Malay,

to any other person not being a Malay, subject to the imposition of such restriction in interest and such conditions in the document of title and such terms of rent as he may think fit; and the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be, under the Land Enactment may be registered if presented with a certificate signed by the State Secretary in the form of Schedule C.

Upon registration such certificate shall be attached to the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be.

- (ii) Upon registration of such Approved Application, Memorandum of Transfer or Application for Registration, as the case may be, the land

A affected thereby shall remain subject to all the provisions of the Malay Reservations Enactment.

- (iii) Nothing in this section shall prevent the transfer or transmission of the right or interest in reservation land of any person not being a Malay to any other person not being a Malay always provided that such right or interest shall have been acquired prior to the creation of the Malay Reservation in which the land is included.

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From the wordings in s 7(i) of the Enactment, it is clear that it prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to or in any person not being a Malay. The question arises as to whether the property purchase agreement confers on the respondent any registered title in the properties.

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As for s 12 of the Enactment, the said section reads as follows:

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- (i) All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void.

- (ii) (a) No money paid or valuable thing handed over in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Reservation land contrary to the provisions of this Enactment shall be recoverable;

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- (b) No action shall lie for breach of contract in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Reservation land contrary to the provisions of this Enactment.

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- (iii) No Land Officer shall register any dealing which is null and void under this section and if any such dealing is registered upon application being made in a summary way to the High Court by any party interested or by the Superintendent of lands or by a District Officer such Court may subject to the rights of any bona fide purchaser for value order that such dealing be deleted from the register.

It is not disputed that the appellant is a Malay as defined under s 3(i) of the Enactment and also a native of Kelantan. Section 3(i) of the Enactment states:

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'Malay' means a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion; and shall include (a) the Majlis Ugama Islam (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay.

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It is also common ground that the respondent is a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business which is to provide financing facilities under the concept of ABBA. As a prerequisite, this concept involves the purchase of the properties by the respondent from the appellant and the immediate resale of the same to the appellant. The issue that requires to be answered, guided by both the Enactment and the Code, is the effect of such sale in the eyes of the law.

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Further, there is no quarrel that the properties are lands declared under s 4 of the Enactment to be included in a Malay reservation. The said s 4 provides:

- (i) His Highness the Sultan in Council may by notification declare any area of land to be a Malay Reservation. A
- (ii) Such notification shall describe the boundaries of such area of land with reasonable accuracy but it shall not be necessary for the purpose of such notification to survey the area therein referred to.
- (iii) His Highness the Sultan in Council may also by notification — B
 - (a) alter the boundaries of any Malay Reservation; or
 - (b) revoke any notification made under subsection (i) either as to the whole or any part of the area therein referred to; or
 - (c) include in any Malay Reservation any land excluded therefrom.
- (iv) Any notification under this section shall take effect from a date to be specified in the notification. C
- (v) Any land whether State Land or land under permanent or temporary title may be included in a Malay Reservation.

It is also agreed that the respondent is neither a Malay nor a native of Kelantan and is a party included in Sch D to the Enactment and Sch 26A to the Land Enactment 1938. D

The parties also confirm that a power of attorney was given by the appellant in favour of one Tengku Mahyuddin who signed the charges in Form 16A on behalf of the appellant in the exercise of the said power. The said charges were presented and registered on 8 May 1984. E

Learned counsel for the respondent in resisting the motion had raised the question of indefeasibility under s 340 of the Code, the interpretation of the enactment vis-a-vis ABBA transactions and the applicability of equitable principles to the facts of the case.

The learned trial judge said (see [1996] 4 MLJ 295 at pp 302–303): F

To my mind, when the property purchase agreement was signed, the right that could be acquired under the agreement at that point of time, since the agreement being still executory, was only a right to a registrable interest which right is yet to crystalize into a registrable interest. The acquisition of such right, however, would confer on the defendant an in personam right against the plaintiff which would entitle the former to bring an action for specific performance in the event of the latter refusing to go along with the agreement. And assuming that a decree of specific performance would be granted by the court, such decree would be effective to achieve a statutory title only upon the appropriate instrument, ie the instrument of transfer, being registered as required under the [National Land] Code as otherwise the decree would remain inefficacious. G

It may be appropriate to mention at this stage that the appellant had alleged that the loan was not disbursed to him but the learned trial judge had immediately rejected the allegation in view of cl 1(a) and 2(a) of the financing facility agreement dated 6 May 1984 executed by the appellant, Mariza Sdn Bhd and the respondent. The relevant excerpt of the judgment of the learned trial judge states (pp 300–301): H

It is also alleged by the plaintiff that the loan was never disbursed to him but as I see it on the strength of the financing facility agreement dated 6 May 1984 executed by the plaintiff, Mariza Sdn Bhd and the defendant and in I

A particular to cll 1(a) and 2(a) thereof, such an allegation can be brushed aside as having no basis at all. Clauses 1(a) and 2(a) are set out below:

1 (a) At the request of the first-named customer ('the plaintiff') and the second-named customer ('Mariza Sdn Bhd'), the bank ('the defendant') hereby agrees to pay the purchase price payable by the bank to the first-named customer under the property purchase agreement to the second-named customer and upon the terms and conditions herein contained.

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2 (a) In consideration of the bank agreeing to pay the purchase price mentioned in cl 1(a) hereof to the second-named customer with the concurrence of the first-named customer, the second-named customer hereby covenants agrees and undertakes with the bank and the first-named customer that the second-named customer shall in place of the first-named customer pay to the bank the purchase price payable by the first-named customer under the property sale agreement ('the purchase price') in the amounts, at all times and in the manner specified in s 1 of the Second Schedule hereto or by instalments of such other amounts as shall be mutually agreed between the bank and the second-named customer.

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As such and in the absence of any evidence to the contrary, it does not now lie in the plaintiff's mouth to deny the arrangements that have therefore been agreed upon between the said parties, more so when the loan had already been disbursed to the second-named customer.

E Before us, proceedings began with a preliminary objection by learned counsel for the respondent; out of the six grounds of appeal, the first three related to the first issue which had been dropped in the court below. Learned counsel for the appellant had readily conceded to this and we consequently upheld the objection.

F Pertaining to the second issue, learned counsel for the appellant referred to s 9A of the Enactment which states:

(1) Notwithstanding anything hereinafter contained the proprietor of any reservation land may charge such land or any part thereof to any person specified in Schedule D, and may in favour of any such person create, subject to the Land Enactment a lien by deposit of the issue document of title for such land.

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(2) His Highness the Sultan in Council may from time to time by order published in the Gazette add to delete from or amend Schedule D.

The respondent is listed in Sch D.

H Accordingly, he submitted that the transactions required the approval of His Highness the Ruler in Council as provided in s 13A of the Enactment. It was his contention that the word 'transfer' in s 7(i) of the Enactment is capable of a wider sense and there is no necessity for a physical transfer. In case of sale, he added, there must be a passing of property, otherwise there was nothing to resell.

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He had cited *Ho Giok Chay v Nik Aishah* [1961] MLJ 49 where the applicant, who claimed to be a 'native of Kelantan' within the meaning of the definition section of the Land Enactment 1938 of Kelantan ('the Land Enactment') but not a Malay, obtained three charges in succession from

the respondent, a Malay, over her land, which was Malay reservation land, to secure repayment of certain loans made to her. The charges were duly registered under the provisions of the Land Enactment. The respondent having defaulted in payment of principal moneys and interest secured by the three charges, the applicant took out a summons to show cause why the land should not be sold for realization of the debts and for an order for sale. The respondent contended that the charges were null and void as being contrary to the Land Enactment.

It was held that s 7(i) of the Enactment precludes a non-Malay from acquiring any right or interest in reservation land, other than leases for limited periods, by transfer or transmission nor can any such right or interest be vested in a non-Malay. It was also held that the power given to a chargee under s 136 of the Land Enactment to compel sale of charged land creates a right to or interest in the land in favour of the chargee, the word 'transfer' has a wide meaning and comprehends a transfer by way of assignment, security or otherwise, and therefore, a charge under the Land Enactment transfers or vests a right or interest to or in the land in the chargee; otherwise a charge would be valueless and of no effect, the essential element being that the chargee is entitled to reimburse himself out of the land, that is to compel payment of the amount due by sale of the land itself.

The court also ruled that s 9A(i) of the Enactment incorporated by Federal Ordinance No 25 of 1954, lifts the prohibition against charging reservation land in favour of some defined persons who are non-Malays, the object of the amendment being to remove the absolute fetter created by s 7(i) of the Enactment. Consequently, the applicant not being within the exempting provisions of s 9A of the Enactment, the charges were held to be null and void under s 12(i) of the Enactment.

At p 51 of the report, Hepworth J said :

I do not think that there is any difficulty over the words 'transfer' and 'vest'. We are not concerned here with transmissions which are dealt with in Part II of the Land Enactment and relate to death or disability. The operative word 'transfer' is one of the widest terms that can be used (per James LJ in *Gathercole v Smith* 17 Ch D 1). Transfer (for example of a debt) does not necessarily mean absolute transfer but may be a transfer by way of assignment, security or otherwise (per Cotton LJ in *Re Combined Weighing Co* 43 Ch D 99). 'Vest', in the absence of a context, is usually taken to mean vest in interest rather than vest in possession (per Romer J in *Re Lord's Settlement* [1948] LJR 207; [1947] 2 All E R 685). See also observations of Brett LJ in *Coverdale v Charlton* (48) LJ QB 132.

I do not think that there can be any doubt that a charge under the Land Enactment transfers or vests a right or interest in something to or in the chargee. If it did not a charge would be valueless and of no effect. But the question with which we are concerned is not whether a charge transfers or vests a right or interest to or in the chargee but whether that right or interest is a right or interest in land.

Learned counsel for the respondent reiterated that for an agreement to have value, there must be registration. On the facts of this case, he

A continued, the respondent was the chargee throughout and an interest in a registered charge is indefeasible.

As regards ss 7 and 12 of the Enactment, the learned trial judge had this to say (pp 304–305):

B In fact, it is invariably the practice that in a sale and purchase agreement it is provided that on the date of completion, the purchaser would be given by the vendor the transfer form together with the document of title and there only remains for the purchaser to effect the registration of the said instrument of transfer. It is upon registration that the title vests in the transferee and indeed it is only when the transferee becomes the registered proprietor that his title will have the indefeasibility which the National Land Code 1965 confers. I must say that in this case there is no evidence to show that there was, at any time, a change in the registered proprietorship of the said lands pursuant to the execution of the property purchase agreement. All along the plaintiff was and is the registered proprietor of the said lands. That being the case, I hold that there was no transfer being effected and the proprietorship still remains with the plaintiff. And I would add that neither was there any vesting of right or interest in the said lands in the defendant. To this end, I would reiterate what I said in *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446 at p 455 that ‘vesting’, as appears in s 7(i), is intended to cover cases where right or interest is indefeasibly vested in a person to form part of his property, thereby enabling him to deal with and alienate such right and interest as his own ...’. The facts of this case, with respect, do not seem to come within the aforesaid ruling.

E On a fair reading of the [Malay Reservations] Enactment, one cannot help but conclude that the intention of the legislature in the promulgation of the Enactment is ‘to preclude Malays from parting with their rights and interests in reservation lands ...’. And to ensure achieving this very intention, certain forms of statutory prohibition have been incorporated in the Enactment in the form of s 7 with the consequences being highlighted in s 12 should there be any infringement thereof.

F He had also distinguished the cases referred to by learned counsel for the appellant, namely *Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazurairyah bte Mohamed* [1988] 1 MLJ 27; *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79; *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379; *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors* [1973] 1 MLJ 9; and *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 by stating (at pp 305–306):

H In all these cases, the court was asked to give effect to what have been allegedly agreed to by the parties which would consequently involved the transfer of proprietorship. Unlike in the instant case, it was never the intention of the parties, in as much as it can ever be said to be within their contemplation, to involve any transfer of proprietorship. It so happened that the execution of the property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant. Hence, that would account for the contemporaneous execution of the two agreements, and in fact, it would be observed that the property purchase agreement would be rendered otiose and bereft of any consequential value the moment the property sale agreement was signed. For my part,

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I would say that that was what both parties had bargained for and they too had agreed that beyond this, to proceed no more. These prerequisites had been well understood by the plaintiff.

Accordingly, it is my judgment that the execution of the property purchase agreement had not transgressed the provisions of ss 7 and 12 of the [Malay Reservations] Enactment since there was no dealing or attempt to deal in the said lands contrary to the provisions thereof.

As regards indefeasibility under s 340 of the Code, the learned trial judge at p 307 states:

... On the premise, I hold that in this case, indefeasibility can only be successfully attacked by evidence which manifests that registration was obtained by 'means of an insufficient or void instrument'. This means a party can successfully seek the aid of s 340(2)(b) if it can be shown that there exists a defect or illegality in the execution of the charge documents, eg if it can be shown that the signature of the chargor is not that of the registered proprietor of the lands of someone authorized by him or that the signature was not properly obtained in that there is present an element of forgery or duress.

There are, however, instances whereby despite registration, the title or interest of any person or body in the land either as proprietor, chargee, lessee or owner of dominant land had been held to be not indefeasible.

At pp 307–308, he has said:

A scrutiny of the charge documents does not disclose any form of defect or illegality. The charge documents are registered in accordance with the procedure laid down in the [National Land] Code and such registration does not run counter to the [Malay Reservations] Enactment either, and this is so by virtue of s 9A and with the inclusion of the defendant in Sch D, nor the [Kelantan Land] Enactment by virtue of s 104(1) and also with the inclusion of the defendant in Sch 26A (s 104 is one of the sections in the [Kelantan Land] Enactment that has been saved upon the coming into force of the National Land Code 1965).

Counsel for the plaintiff has also made a rather fleeting comment on the failure to register the power of attorney with the Pengarah Tanah dan Galian (Director of Lands and Mines) since registration of the charges was carried out by him as the said lands were being held under registry titles. Be that as it may, I do not think that such a failure would give rise to any legal impediment to the registration process in view of some directory measure that have to be taken pursuant to Chap 1 and 2 of Part Eighteen of the [National Land] Code. And coupled with the presumption of existence of certain facts as illustrated in para (e) of s 114 of the Evidence Act, ie that judicial and official acts have been regularly performed, I see no reason, on the facts, to question the validity of the registration. Moreover, if the plaintiff is mindful of pursuing this issue, he should have joined in as a party, the Pengarah Tanah dan Galian — but he had not!

In view of the foregoing, I am satisfied that there is nothing in law and in fact that could deny the indefeasibility accorded by s 340 of the [National Land] Code to the two charges registered on 8 May 1984 by the plaintiff's attorney in favour of the defendant. As evidenced by the charge documents, the defendant's right and interest therein only accrue as registered chargee and that is the extent of what the defendant claims.

A Concerning the applicability of equitable principles to the facts of the instant case, the learned trial judge had discussed the question of intention of both parties in signing the property purchase agreement and the property sale agreement which had been made quite clear from the agreements entered into and he was of the view that there was in fact nothing further to add.

B At the end of it all, we saw no reason to disagree with the findings of the learned trial judge and had unanimously dismissed the appeal with costs with the deposit to go to the respondent to account of its taxed costs.

Appeal dismissed with costs.

C Reported by Loo Lai Mee

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